No. 14540

United States Court of Appeals

For the Ninth Circuit

Boeing Airplane Company, a corporation,
Petitioner,

vs.

National Labor Relations Board,
Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR REVIEW OF AND TO SET ASIDE, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

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United States Court of Appeals
For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation, *Petitioner*, vs. NATIONAL LABOR RELATIONS BOARD, *Respondent*.	No. 14540

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR REVIEW OF AND TO SET ASIDE, IN PART, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Listed below are certain abbreviated references used herein:

Boeing Airplane Company, a corporation, petitioner	Boeing, or, Company
National Labor Relations Board, respondent	Board
Seattle Professional Engineering Employees Association, a labor organization	SPEEA, or, Union
National Labor Relations Act, as amended (61 Stat. 136, 137, 139, 140, 146, 150-152; 65 Stat. 601; 29 U.S.C. §§151-168)	Act
Intermediate Report and Recommended Order of Trial Examiner, dated December 28, 1953	Recommended Order
Decision and Order of Board, dated September 30, 1954	Board Order
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I.

Statement of Pleadings and Facts Concerning Jurisdiction of The Board and Jurisdiction of The Court

The statutory provisions believed to sustain the jurisdiction of the Board to enter the Board Order here sought to be reviewed, and the pleadings and facts necessary to show the existence of such jurisdiction are as follows:

(1) *Statutory provisions.* The Act (61 Stat. 136, 137, 139, 140, 146, 150-152; 65 Stat. 601; 29 U.S.C. §§151-168); particularly §§10(a), (b), (c), 61 Stat. 146, 62 Stat. 991, 29 U.S.C. §160, contains the statutory provisions sustaining the Board's jurisdiction.

(2) *Pleadings.* Paragraphs I and II of the Board complaint state the facts relative to the Board's jurisdiction and describe the nature of the Company's business and the interstate and commercial aspects thereof (R. 7). Paragraphs I and II of the Company's answer admit such paragraphs of the complaint (R. 14).

(3) *Facts.* The facts pertinent to the Board's jurisdiction are: The Company is a Delaware corporation, maintaining its principal office at Seattle, Washington. It operates plants in Wichita, Kansas and in Seattle and Renton, Washington, at which it is engaged in the manufacture of aircraft and aircraft parts. In the course and conduct of its business, and at all material times the Company purchased for use in its Seattle and Renton plants, materials, supplies and equipment originating outside of the State of Washington valued in excess of $1,000,000 annu-

ally; it manufactures and sells to agencies of the United States Government and to operators of commercial airlines, aircraft and aircraft parts valued in excess of $1,000,000 per year. No contention is made that at such times the Company was not involved in commerce and business activities affecting commerce, within the meaning of those terms as defined in the Act (R. 7, 14, 26).

The statutory provisions believed to sustain the jurisdiction of this Court to review the Board Order in question and the pleadings and facts necessary to show the existence of such jurisdiction are as follows:

(1) *Statutory provisions.* Section 10(f) of the Act, 61 Stat. 146, 62 Stat. 991, 29 U.S.C. §160; and the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §1001, *et seq.* (particularly 60 Stat. 243, 5 U.S.C. §1009) contain the statutory provisions sustaining the Court's jurisdiction.

(2) *Pleadings.* The petition for Review of and to Set Aside, in Part, an Order of the National Labor Relations Board, filed with this Court October 7, 1954 (R. 154-62) (particularly paragraph 2 thereof) states the facts relative to the Court's jurisdiction.

(3) *Facts.* The facts pertinent to the Court's jurisdiction are as stated in the preceding paragraph relating to the Board's jurisdiction.

II.

Statement of Case, Question Involved, and Manner in Which Raised

This case presents for the Court's review the sole question as to whether Boeing violated the Act on

January 27, 1953, by discharging from its employ one Charles Robert Pearson on that date.

The Trial Examiner, after an exhaustive analysis of the facts and applicable law, found the discharge properly to be within the Company's prerogative and recommended dismissal of the complaint in its entirety (R. 111). Three members of the Board concluded otherwise and considered the discharge to constitute a violation of the Act (R. 139). Two members, dissenting, found that the discharge did not violate the Act (R. 148). On the basis of the majority opinion the usual elaborate form of Board order issued on September 30, 1954, which order would require the Company to "cease and desist" from: "discouraging membership in [SPEEA], or in any other labor organization of its employees, by discriminating in regard to their hire or tenure of employment, or any term or condition of employment; in any like or related matter interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist [SPEEA], or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities, * * * " (R. 143). The order would further require the Company to "make whole" Pearson for any loss of pay occasioned by the discharge, and to post the usual Board form of notice which would in effect publicize to the Company's employees that it has been guilty in these

various respects and would further cause the Company to publicize what would amount to a promise on the part of the Company to rectify such stated violations (R. 148-150).

The Board Order dismissed all of the other contended violations of the Act alleged in the complaint—that the Company had refused to bargain in good faith in connection with Pearson's discharge, that it had refused to bargain in good faith in connection with a unilateral salary increase mentioned in the Record; and even the majority, in finding that the discharge constituted a violation, stated that the discharge "resulted from the [Company's] good faith but mistaken belief as to its rights under the Act" (R. 140). Review is sought only in respect of the part of the Board Order (predicated on such majority opinion) relating to the stated illegality of the discharge.

The question presented for review is in essence one of law in that the Record shows no factual issue of moment. There is no question but that Pearson was discharged for the activities regarded respectively as "protected" and as "unprotected" by the majority and minority Board opinions. There is no significant dispute as to the nature of these activities (R. 27, 131), although certain aspects thereof have been, in our view, either overlooked completely or unduly underemphasized by the majority. Accordingly, the question can be restated as one of law: Must the Act be construed as extending to employees the right to engage with impunity in activities of the type that occasioned Pearson's discharge, thus to compel an employer to retain in its

employ and continue to pay full compensation to an individual so engaged?

The Record, insofar as it bears on this question and is descriptive of the nature of the activities involved, is now summarized.

SPEEA, representing some 3,500 non-supervisory engineers at the Company's Seattle Division (R. 388), and the Company engaged in collective bargaining negotiations for a new contract throughout the period subsequent to April 7, 1952 (R. 10, 15, 519, 521) until the time of the hearing before the Trial Examiner which took place June 23, 24 and 25, 1953 (R. 25) and as of the latter time the parties had been unable to reach agreement (R. 22). The previous contract had expired in August of 1952 and (except for the salary increase of March 12, 1953 mentioned in the Record) the conditions of the old contract were continued by the Company during the period of negotiations (R. 388). The General Counsel made no contention that the Company had refused or failed to meet the standards of good faith bargaining set by the Act, except solely in respect of Pearson's discharge (see complaint R. 6-14, and R. 461), and in the latter respect the Trial Examiner, the Board majority and the Board minority each concluded that the Company had fully discharged the duty to bargain in good faith (R. 106, 140, 148). The relations of the parties, dating back to SPEEA's certification in 1946 (R. 386) had been at all times amicable (R. 27, 387).

As early as 1951 an executive group within SPEEA set up an "Action Committee" specifically designated

to originate and develop plans for various types of action to be taken in order to bring "pressure" on the Company (R. 31). Among the plans proposed or suggested by such committee was a course of action that has been labeled in the Record, in the interests of brevity, the Manpower Availability Conference, or MAC. This was the plan eventually put into action, to the exclusion of the others, and Pearson's connection with it was the reason for his discharge. However, it is considered pertinent (the Trial Examiner did not agree —R. 101) to point out that the plan was conceived and publicized to Union members and the Company along with such associated proposals as: mass refusals to punch timeclocks; mass refusals to work overtime; "arrangement" of simultaneous medical or dental appointments to bring about sporadic mass absences; intermittent work stoppages; union meetings during working hours; and action calculated to "neutralize" the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment (R. 100, 240, 245-6, 334-9, 345-6, 370).

These associated plans of action as well as the MAC were publicized over an extended period to SPEEA members and also were, during such period, publicized to the Company as a matter of regular Union practice during the period of bargaining heretofore mentioned, and during such period constituted a continuing threat to the Company (R. 261, 351-2, 388, 415-6, 418). As mentioned, only the course of action identified as the MAC eventually was undertaken and the other pro-

posals were not; but mention of such other proposals is considered pertinent as being descriptive of the background of the general situation leading up to Pearson's discharge, as tending to show the *nature of the primary intended result* of the MAC and as affording evidence on the point later discussed in the Argument as to whether SPEEA approached the 1952-3 negotiations in the manner and with the degree of good faith required by the Act.

In short, the MAC consisted of a plan, the primary intended result of which was to induce and encourage substantial numbers of the Company's engineers to leave the Company's employ, for employment with other firms, in order to so incapacitate and damage the Company as to force it to capitulate to the Union's demands; and to accomplish this by a means that would involve none of the risks of a strike (R. 343-4) and that would in the meantime preserve complete job security and full compensation to each employee without any risk whatever. (Other purposes were also ascribed by Union leaders to the MAC—to obtain data concerning the "market value" of engineers and to provide a meeting place where prospective employers could be contacted on an exploratory basis (R. 32, 477), but when the entire Record is weighed, such purposes can only be regarded, if at all, as inconsequential and as collateral and incidental to the primary intended result, stated above.)

Pursuant to the MAC "plan of action" most of the firms in the United States known by the Union to employ engineers (around 2,800) were to be contacted,

informed that a substantial number of engineers were available for employment, and invited to send representatives to Seattle for the purpose of interviewing and hiring such engineers (R. 197-8, 478). The plan was designed solely for Boeing engineers and participation therein was limited to them (R. 37, 267). In the description of the plan prepared by the Union committee that conceived and designed it, a stated purpose of the plan was candidly represented to be "To *encourage* engineers to seek more suitable employment elsewhere" (R. 368) (emphasis added). Extensive publicity was given to the plan in the Union newspaper and other Union publications over a considerable period of months preceding its activation (R. 261, 337, 351). The Union leadership distributed to SPEEA members a ballot (R. 481-2) intended to secure an expression from the membership as to the willingness of members to participate in such course of action. The publicity accompanying such ballot, in the form of a report, characterized the MAC as a "*punitive* action to reduce the Engineering services available to Boeing" (R. 33, 478) (emphasis added). It also represented to the membership that the publicity attendant upon the MAC would have a "*punitive*" action to discourage new hires from coming to Boeing (R. 32-3, 477-8) (emphasis added). It listed various questions in the nature of anticipated possible employee objections to the MAC and then answered such questions in a manner calculated to quiet any reluctance on the part of the membership in these respects (R. 34-5).

Only 871 ballots were returned and on such ballots

516 employees indicated an intention to participate, 355 employees declined to participate; and of the 516 employees, 420 indicated that they did "not necessarily desire" to leave the Company's employ (R. 35). There were at the time approximately 3,500 in the collective bargaining unit represented by the Union (R. 388) and of these approximately 2,100 were members of the Union (R. 35, 310). Fifty-nine per cent of the Union membership (seventy-five per cent of those in the bargaining unit) did not vote at all.

Throughout, the Union was well aware of the fact that engineers were in critically short supply (R. 360), and of the potential damage to the Company inherent in activating the MAC plan of action (R. 419-20).

The Union leadership proceeded with preparations for the MAC. A Union sub-committee was designated to search for suitable halls to rent and to provide furniture and equipment to handle the anticipated interviews with representatives of other firms (R. 485). Another sub-committee was designated to compile, print and distribute suggestions for interviewers; to arrange and schedule private interviews between engineers and other employers; to distribute and collect "offer data cards" and accept "acceptance data cards"; to make final arrangements, including determination of the date and issuance of invitations to the press; and to obtain an employment agency license from the City of Seattle for use in connection with the MAC (R. 485).

Bargaining negotiations continued through the fall of 1952 into the early part of 1953 without agreement being reached and early in January of 1953, Pearson,

in charge of the MAC, sought and secured the employment agency license mentioned above and other preparations were made (R. 43, 200-1).

On or about January 23, 1953, the MAC plan of action was put into effect at which time letters over Pearson's signature were mailed to more than 2,800 firms throughout the United States, in the following form:

> "[Letterhead of Seattle Professional Engineering Employees Association]
>
> "Are you in Need of Additional Engineers?
>
> "The Seattle Professional Engineering Employees Association, with a membership of 2,300, invites your Company to participate in a Manpower Availability Conference to be held in Seattle about March 9th, 1953. The purpose of the Conference is to put employers of engineers in contact with those of our members who are available for new positions.
>
> "Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference. Represented in this group are men of assorted lengths of experience and types of training as is portrayed by the attached graphs. A distinction between men who are actively seeking new connections and those whose interest is more dependent upon the advantages of other situations will be noted in the make-up of the graphs.
>
> "These engineers are looking for more than a change of scenery. They are employed engineers who feel they would be capable of greater accomplishment in positions where engineering talents are directed more specifically to engineering work and where credit for individual effort and recognition of engineering excellence are more general.

They seek a working climate where their training and ability will be more fully utilized and in which compensation is in proportion to talent and productiveness.

"In order to provide a better understanding of the type of conference which is contemplated, a general outline of its operation might be of interest. It is planned that the Conference will be conducted in two separate phases.

"The first phase will provide the means of quickly and efficiently arranging interviews beween the five hundred engineers and the participating companies. This will be accomplished by conducting exposition-like meetings on as many consecutive evenings as appears necessary. At this time, the engineers, perhaps accompanied by their wives, will visit the various booths, which are to be provided for each of the participating companies.

"The representatives of each company will here have the opportunity to address groups of engineers, to explain the company's needs and the advantages of employment with it, and to distribute descriptive literature and application blanks to those who are interested. Secretaries at a centrally located Association booth will then make appointments for private interviews.

"Providing an opportunity for the participating companies to show a limited number of motion pictures is under consideration. The Association will provide ditto and mimeograph facilities for any duplicating the company representatives may require. An augmented Association secretarial staff will also be at their disposal.

"The second phase of the Conference will consist of individual private interviews. These

interviews may be conducted in the hotel rooms of the company representatives or, if it is desired, the Association will provide other suitable facilities.

"Inasmuch as these engineers are seeking particular situations wherein their experience and capabilities are most fully utilized, it is recommended that the participating companies send engineering representatives who can accurately present detailed job requirements and describe the conditions of employment on the company's engineering staff. These representatives should come prepared to make firm offers when they interview engineers meeting their requirements.

"It is planned that the Conference will be self-liquidating. For this reason, each company will be asked to pay a registration fee of $25 and an additional fee of $10 for each engineer hired as a direct result of the Conference. These fees may be rebated on a pro rata basis if the costs of the Conference are appreciably less than the fees collected. Each engineer who accepts a position as a result of the Conference will be charged a fee of $15.

"To insure adequate preparation for the Manpower Availability Conference, commitments to attend will be accepted until February 6, 1953. Answers to the questions appended to this invitation will aid the Association in its planning for the Conference. Receipt of acceptances of this invitation will be acknowledged in a subsequent letter which will announce the date and supply additional details.

Yours very truly,
/s/ Chas. Robt. Pearson,
Director Manpower Availability Service (Licensed and Bonded Employment Agent)

"How many engineers do you need?

"How many representatives will you send?

"Would you like for the Association to make your hotel reservations? What accommodations are desired?

"What special facilities would you wish the Association to supply? Please note that individual sound amplification systems will not be permitted." (R. 486-9)

To each of these letters was attached an exhibit (R. 491) purporting to indicate the number of engineers and their qualifications who were "planning to leave present employment" or "who seek a more attractive situation."

The Company was first advised of the activation of the plan by the following letter from the Union:

"[Letterhead of Seattle Professional Engineering Employees Association]

"Correct Address:
3121 Arcade Bldg., Seattle 1, Wn.

"Mr. A. F. Logan, Vice President
Industrial Relations, Boeing Airplane Co.
Seattle 14, Wn.

"Dear Sir:

"1. This is to advise you that SPEEA has started and will complete a Manpower Availability Conference.

"2. Various companies are to be invited to come to Seattle to interview those SPEEA members who have expressed a desire to entertain offers of employment.

"3. This conference is being conducted for the following purposes:

"(a) To provide members with improved opportunities to bargain for their services. Our membership has requested SPEEA to restore the freedom and privacy of engineers who seek to improve their situations by changing employers.

"(b) To obtain data on the true market value of engineers with various amounts of experience.

"4. In offering this service to its members, SPEEA has retained an agency for bringing together those engineers and companies who may care to discuss employment possibilities. SPEEA offers no special inducement to engineers to terminate, nor does it enter in any way into negotiations between the companies and the engineers.

Very truly yours,

/s/ E. M. Gardiner, Chairman
Executive Committee.

Rec'd 1/23/53." (R. 493-4)

At the time of receiving this letter the Company had no idea that the "agency" to which reference is made in the 4th paragraph of the letter and which had been "retained" by SPEEA, was Pearson (R. 44, 413).

A copy of the letter captioned "Are You in Need of Additional Engineers" (R. 486-491) was brought to the attention of A. F. Logan, Company officer in charge of industrial relations, about the same time (R. 413-4). Logan had no personal knowledge of the fact that Pearson was a Boeing employee but upon learning this, Logan asked that Pearson return from assignment in Los Angeles so that Logan could talk to him (R. 414). In the ensuing discussion between Logan and Pearson (R. 494-9) Pearson was identified as the signatory of the letter of invitation and as the "Licensed and Bonded

Employment Agent'' mentioned therein, and after having been given by Logan the choice of foregoing his activities in connection with the MAC or terminating his employment with the Company, and having declined to state a choice, he was terminated.

Thereafter, the Company was informed that only eighteen replies to the MAC invitation had been received by SPEEA, and that the MAC was considered to have failed in its objectives and was to be abandoned (R. 53, 253, 323). Also, after various negotiations with SPEEA on the subject of Pearson's discharge and after the Union had stated to the Company in writing that it would ''recommend rejection of *any* offer made by the Boeing Airplane Company until such time as * * * Pearson is reinstated unequivocally'' (R. 513) (emphasis added), Pearson was reinstated by the Company to his former position without prejudice, and with all of the rights and privileges acquired by him prior to his termination, in order to remove the incident as a stumbling block to further contract negotiations (R. 54, 134, 237, 323, 422, 514-9). He was employed by SPEEA in the interim, suffered no loss of income (R. 315) and no such loss was claimed (R. 516). Also in the interim, Pearson continued as MAC chairman (R. 252) and his discharge had nothing whatever to do with its failure (R. 253-4).

On April 20, 1953, the charge appearing on pages 3 to 5 of the Transcript of Record was filed against the Company by SPEEA. On June 3, 1953, the Regional Director issued the Complaint against the Company appearing on pages 6 to 14 of the Transcript of Record.

Thereafter the Company filed its answer, denying that it had violated the Act in any way, and charging therein that the Union had refused to bargain in good faith as required by the Act in connection with the organization, promotion and operation of the MAC (R. 14-9). The hearing before the Trial Examiner occurred in Seattle, Washington, June 23, 24 and 25, 1953 (R. 25) and the Recommended Order of the Trial Examiner issued December 28, 1953 (R. 111). Certain exceptions to the Recommended Order were filed by all parties (R. 116-30), and the Board, after denying all requests for oral argument (R. 130-1), issued the Board Order, as stated, on September 30, 1954 (R. 130). The petition for review was filed in this Court October 7, 1954.

After Pearson's reinstatement and during the period up to and including the time of the hearing before the Trial Examiner, SPEEA and the Company were continuing to negotiate for a new contract (R. 394-5).

III.

Specification of Errors

The basic errors upon which the Company relies are the errors of the Board in finding that the Company had violated the Act in discharging Pearson, and in failing to find that the Union's conduct in connection with the MAC amounted to a violation of the duty imposed by Section 8(b)(3) and 8(d) of the Act to bargain in good faith. The errors designated below are correlative to these basic errors but in accordance with Rule 18(d) are specified as follows:

(a) The failure of the Board to find merit in the

Company's exceptions numbered 1 to 9, inclusive, to the Recommended Order.

(b) The failure of the Board to find the Union-sponsored MAC, to which reference is made in the Board Order, to be an unprotected activity under the Act.

(c) The refusal of the Board to find that the activities of SPEEA and its members in connection with the MAC—at a time when the parties were engaged in collective bargaining negotiations—constituted an unfair labor practice and a refusal to bargain in good faith on the part of SPEEA in violation of Section 8(b)(3) of the Act, and to find therefore that such activities could not at the same time have been protected activities under the Act.

(d) The finding by the Board that the MAC did not contravene the policies of the Act.

(e) The finding by the Board that the MAC constituted merely "a conditional threat that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bargaining demands."

(f) The finding by the Board that the MAC "was directly related to matters of collective bargaining in issue between the Respondent and the Union" rather than finding that, at and subsequent to the time of its activation, it was a device to bring about a permanent exodus of a substantial number of the Company's employees to other employers.

(g) The refusal of the Board to find that the conduct of SPEEA and of Pearson in connection with the MAC

was indefensible and improper with respect to the Company.

(h) The finding by the Board that the company discriminated against Pearson to discourage Union membership and activity.

(i) The finding by the Board that the Company interfered with, restrained or coerced its employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) and in finding that the Company was in violation of Section 8(a)(3) of the Act.

(j) The finding by the Board that the remedy of back pay is appropriate and will effectuate rather than contravene the policies of the Act.

(k) The finding by the Board that Pearson's discharge was improper, particularly after finding that the Company had discharged its duty to bargain in good faith concerning such discharge.

(l) The direction by the Board that the Company post the notice, a copy of which is attached to the Board Order as Appendix A.

IV.

Argument

Summary: Pearson's discharge was proper because the activities for which he was discharged are not protected by Section 7 of the Act; his discharge was proper because the activities for which he was discharged were part of a pattern of conduct that amounted to a refusal to bargain in good faith on the part of the Union as required by Sections 8(b)(3) and 8(d) of the Act; and

his discharge was properly "for cause" under Section 10(c) of the Act.

* * *

1. Pearson's discharge was proper because the activities for which he was discharged are not protected by Section 7 of the Act.

The majority Board opinion is premised on a broad, and in our view wholly unwarranted, interpretation and application of Section 7 of the Act (Sections 8(a)(1) and 8(a)(3) are involved only because of the majority's position in respect of Section 7) (R. 139-40).

The language of Section 7, insofar as pertinent, is as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * * ."

Were the language of this Section to be considered without further reference to the context of the Act, a literal reading might suggest an extension to employees of the right to engage unhindered and with impunity in any and all "activities" if "concerted" and if engaged in for the purpose of "mutual aid or protection."

On such theory, any activity involving two or more employees, and irrespective of the means used or the circumstances involved, would be deemed clothed with the Section's protection if the ultimate purpose is

found to be "mutual aid or protection." The language does not distinguish between "legal," "defensible," "proper" or "loyal" activities on the one hand, and "illegal," "indefensible," "improper" or "disloyal" activities on the other. It contains no definition that would exclude from its protection concerted activity even though such activity be in the form of slowdown, sitdown strike, wildcat strike, intermittent strike, damage to business or to plant and equipment, trespass, violence, refusal to accept work assignment, disloyalty, mass picketing, physical sabotage, refusal to obey rules, insistence on working on employees' terms or the like.

Although Congress did not undertake an express and specific definition of the "concerted activities" afforded protection under Section 7, it is clear, when the Act is studied in its entirety and its legislative history considered, that a broad interpretation of the term is neither required nor was it intended.

First, there is nothing in the broad statements of policy found in Section 1 of the Act that compels or even infers congressional sanction of the broad interpretation of Section 7 adopted by the Board majority. These statements, which in effect set forth the reasons considered by Congress as justifying and compelling such legislation, clearly support the idea that the type of right intended to be protected by the Act is one conducive to "encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions * * * " (Act, Section 1, third paragraph).

Then, the context of the language of Section 7 affords

some key to the restricted scope of the section intended by Congress. As stated in *Joanna Cotton Mills v. N.L.R.B.*, 176 F.2d 749, 752 (CA-4, 1949):

> "The words 'concerted activities' are limited in meaning by the words with which they are associated (noscitur a sociis), which have relation to labor organization and collective bargaining, and by the purpose of such 'concerted activities,' which is expressly limited by the immediately succeeding language to concerted activities 'for the purpose of collective bargaining or other mutual aid or protection.' "

Again, Section 8 imposes the duty upon employers and unions alike "to bargain collectively," that is, to perform "the mutual obligation * * * to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder" (Act, Sections 8(a)(5), 8(b)(3), and 8(d)). The "concerted activities" to which reference is made in Section 7 must be measured in the light of the affirmative duties imposed upon the parties by Section 8.

Further, the Act specifies that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for *cause*" (Act, Section 10(c)) (emphasis added). It is to be noted that this provision relates to "any individual," affords no distinction as between individuals acting alone or in concert, and expresses no limitation as to the word "cause."

Additional indication that restriction of the term "concerted activities" in Section 7 was intended by Congress is the fact that it was considered necessary or advisable to make specific reference to the traditional concerted activity, the strike: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right" (Act, Section 13).

As to historic background, we quote the statement of the Trial Examiner in the Recommended Order (R. 67-8):

> "In connection with the 1947 amendment of the Act, Congress, too, made its position clear with respect to the limitations which ought to be imposed upon 'protected' concerted activity. In the *House Conference Report* (No. 510, 80th Congress, pp. 38-39) on the statute as amended, reference is made to certain early Board decisions that the language of the original Act protected concerted activities regardless of their nature or objectives. The conference report pointed out that these Board decisions had not received judicial approval—and went on to say that:
>
> " ' * * * the courts have firmly established the rule that under the existing provision of Section 7 of the National Labor Relations Act, employees are not given any right to engage in *unlawful or other improper conduct*. In its most recent decisions the Board has been consistently applying the principles established by the courts * * *
>
> " 'By reason of the foregoing, it was believed that the specific provisions in the House Bill ex-

cepting unfair labor practices, unlawful concerted activities, and violation of collective bargaining agreements from the protection of Section 7 were unnecessary. Moreover, there was real concern that the inclusions of such a provision might have a limiting effect and make *improper conduct* not specifically mentioned subject to the protection of the act.

" 'In addition, other provisions of the conference agreement deal with this particular problem in general terms. For example, in the declaration of policy to the amended National Labor Relations Act adopted by the conference committee, it is stated in the new paragraph dealing with improper practices of labor organizations, their officers, and members, that the "elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." This in and of itself demonstrates a clear intention that these *undesirable concerted activities* are not to have any protection under the act, and to the extent that the Board in the past has accorded protection to such activities, the conference agreement makes such protection no longer possible. (Emphasis supplied)' "

And at the times that the Act was amended in 1947 and again in 1951 numerous decisions of the Board and of the Courts, some of which are hereinafter cited, had determined certain activities to be unprotected. With knowledge of these decisions, Congress did not amend or expand the scope of Section 7 and it continues to remain in the form originally enacted as part of the Wagner Act in 1935.

As of the present time various concerted activities have been determined by the Board and by the Courts

to be unprotected under Section 7. The characterization of such conduct has ranged from "illegal," *N.L.R.B. v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 83 L.Ed. 627 (1939), to "unlawful," *N.L.R.B. v. Kelco Corp.,* 178 F.2d 578 (CA-4, 1949), "improper," *Pacific Telephone Co.,* 107 NLRB No. 301, 33 LRRM 1433 (1954), *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton),* 336 U.S. 245, 93 L.Ed. 651 (1949), "indefensible," In re *Jefferson Standard Broadcasting Co. and International Brotherhood of Electrical Workers,* 94 NLRB No. 227, 28 LRRM 1215 (1951), and "disloyal," *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.),* 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953), *Montgomery Ward & Co.,* 108 NLRB No. 152, 34 LRRM 1123 (1954).

And in the House Conference Report (No. 510, 80th Congress, pages 38-39) it is to be noted that "unlawful," or "improper," or "indefensible" are the terms used in referring to concerted activities that were intended to be left unprotected.

The concerted activities that have been found to derive no protection under Section 7 have included "hit and run" strikes, *Pacific Telephone Co., supra; Textile Workers, CIO (Personal Products Corp.),* 108 NLRB No. 109, 34 LRRM 1059 (1954); intermittent work stoppages, *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton), supra;* part time strikes, *Honolulu Rapid Transit Co.,* 110 NLRB No. 244, 35 LRRM 1305 (1954); partial strikes, *Valley City Furniture Co.,* 110 NLRB No. 216,

35 LRRM 1265 (1954); *N.L.R.B. v. Draper Corporation,* 145 F.2d 199 (CA-4, 1944); refusals to work on employer's terms, *N.L.R.B. v. Massey Gin & Machinery Works, Inc.,* 173 F.2d 758 (CA-5, 1949); "slow downs," *Elk Lumber Co.,* 91 NLRB No. 60, 26 LRRM 1493 (1950); *Phelps Dodge Copper Products Corp.,* 101 NLRB No. 103, 31 LRRM 1072 (1952); *Textile Workers, CIO (Personal Products Corp.), supra;* disloyalty, *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra;* sabotage, *Mt. Clemens Pottery Co.,* 46 NLRB No. 714, 11 LRRM 225 (1943); and violation of employment contract, *Washington National Insurance Co.,* 64 NLRB 929, 17 LRRM 154 (1945), to mention some.

The terms "disloyal," "unlawful," "improper," "indefensible," and "illegal," are broad terms and the decisions have suggested no particular limitation to their scope. No case has been found involving circumstances that parallel exactly the circumstances in the instant case, but it is urged with all possible emphasis that each of these terms applies to the activities that occasioned Pearson's discharge.

The most recent announcement of the United States Supreme Court on the subject was in *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra,* discussed both in the majority and minority Board opinions, the Supreme Court in that case stating (346 U.S. 464, at 472, 476):

> " * * * There is no more elemental cause for discharge of an employee than disloyalty to his

employer. It is equally elemental that the Taft-Hartley Act seeks to strengthen, rather than to weaken, that co-operation, *continuity of service* and cordial contractual relation between employer and employee that is born of *loyalty to their common enterprise.*

" * * *

" * * * It [the employees' conduct] was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability." (R. 146-7) (emphasis added)

In *International Union, et al. v. Wisconsin Employment Relations Board, et al. (Briggs & Stratton), supra,* the Supreme Court expressed the following view (336 U.S. 245, at 257):

"In the light of labor movement history, the purpose of the quoted provision of the statute [Section 7] becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect inter-state commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. *But because legal conduct may not be made illegal by concert, it does*

not mean that otherwise illegal action is made legal by concert." (emphasis added)

The Court of Appeals for the 8th Circuit in *N.L.R.B. v. Montgomery Ward & Co., Inc.,* 157 F.2d 487, 496 (CA-8, 1946) said:

"It was implied in the contract of hiring that these employees would do the work assigned to them in a careful and workmanlike manner; that they would comply with all reasonable orders *and conduct themselves so as not to work injury to the employer's business; that they would serve faithfully and be regardful of the interests of the employer during the term of their service,* and carefully discharge their duties to the extent reasonably required." (emphasis added)

The Court of Appeals for the 7th Circuit in *C. G. Conn Limited v. N.L.R.B.,* 108 F.2d 390, 397 (CA-7, 1939) said:

" * * * *We are unable to accept respondent's argument to the effect that an employee can be on a strike and at work simultaneously.* We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance. * * *

" * * *

"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. That is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the

hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (emphasis added)

The Court of Appeals for the 6th Circuit in *Hoover Co. v. N.L.R.B.*, 191 F.2d 380, 386 (CA-6, 1951) said:

> " * * * The Act does not confer absolute right upon employees to engage in every kind of strike or other concerted activity; and the fact that certain concerted activity is explicitly protected by the statute, does not mean that improper concerted activity is also protected. For it is not necessary that such improper activities be explicitly excepted from the protection of the statute. The rights set forth in the Act are not to be considered as including the right to commit or participate in unfair labor practices or unlawful concerted activities; and the courts have firmly established the rule that under the provisions of Section 7 of the Act, employees are not given any right to engage in unlawful or other improper conduct. International Union, Auto Workers, v. Wisconsin Employment Relations Board, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651."

and at page 389:

> " * * * *He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business."* (emphasis added.)

and at page 390:

> "Of course, an employee can engage in 'concerted activity for mutual aid and protection' even though it may be highly prejudicial to his employer, and results in his customers' refusal to deal with him, just as long as such activity is not a

> wrong done to the company. * * * It is a wrong done to the company for employees, while being employed and paid wages by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself."

Let us examine the course of action identified as the MAC in light of these statements. Assuming for the purposes of argument that the ultimate long range objective of the MAC may have been to obtain higher salaries or better working conditions for certain individuals, in the employ of Boeing or in the employ of some other employer, there can be no doubt but that the *primary intended result of the means used was to effect severe damage on the Company, while at the same time employing a technique that would permit all employees, including the union leaders sponsoring the action, to continue to draw pay and retain complete job security.*

The majority Board opinion glosses over the matter of the primary intended result of the MAC and the potential damage to the Company involved therein, and purports to regard the damage potentially resulting from the *means* (MAC) used by SPEEA as meriting no important consideration. The majority in effect reasons something like this:

> The means used in a concerted activity and the consequences resulting from such means are unimportant and immaterial to the determination of the "protected" nature of the activity. The con-

> certed activity is to be tested on the basis of its ultimate long-range objectives alone and so long as those objectives are "mutual aid or protection" or "to secure other employment" or "for purposes of collective bargaining," the activity is protected under Section 7 and the means used are of negligible consequence. (See R. 134-5).

This dubious reasoning would render "presumptively lawful and protected" (R. 135) about all of the activities that the courts have found to be unprotected including activities of the type mentioned on page 21 of this brief.* The majority then attempts to substantiate this position by stating:

> "The classic example of a protected concerted activity—a strike—obviously may result in serious financial loss to the affected employer" (R. 135).

The majority Board opinion—in attempting to find an analogy in the strike (in which the primary intended result of the means used is to inflict economic damage

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* As to the *Peter Cailler Kohler* case (*N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.,* 130 F.2d 503 (CA-2, 1942)) cited by the Board majority in support of this position, the decision is premised on the idea that an activity can be unprotected only if it is "unlawful" (a theory long since obsolete, particularly in view of the decision of the Supreme Court in the *Jefferson Standard* case). Moreover, the decision arose out of occurrences that took place seven years prior to the amendments to the Act in 1947 which for the first time imposed various obligations upon unions, including the duty to bargain in good faith and to refrain from the other unfair labor practices defined in Section 8(b). Further, the employee discharged in the *Peter Cailler Kohler* case was not engaged in any activity, concerted or otherwise, where the primary intended result of the activity was to effect damage on the employer.

upon an employer)—completely overlooks the fact that such intended result does not involve a simultaneous attempt to damage the employer severely *and draw pay and maintain job security at the same time.* It also overlooks the fact that in the case of an economic strike (as distinguished from a strike precipitated or prolonged by an unfair labor practice on the part of the employer) the employer has the right to replace strikers and is under no duty to re-employ such replaced strikers, *N.L.R.B. v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938); *Sax v. N.L.R.B.,* 171 F.2d 769 (CA-7, 1948).

The majority opinion further ignores other vital differences between a strike and the MAC plan of action. A legitimate strike is under the direct control of the union and can be terminated at the union's instance. Once such a course of action as the MAC has progressed to the point where mass terminations have taken place, the union is without control and cannot re-establish the normal employment relationship. The employees have gone. Terminations pursuant to an MAC type of action are permanent. Absences in connection with a strike are temporary. The potential ultimate damages resulting from the activities here involved are of a magnitude far in excess of those resulting from a strike, and the former type of damage is largely irreparable.

The majority Board opinion also takes the tack that "There was here in essence only a *conditional threat* that some of the Respondent's employees would resign if the Respondent did not meet the Union's stated bar-

gaining demands * * * " (R. 137). (emphasis added). The Record simply does not support this statement. At the time of Pearson's discharge the MAC was organized far beyond the point of a mere "conditional threat." Arrangements for accommodations and other features of the plan had been made. Invitations had been mailed out to 2,800 other firms employing engineers. The invitation sent to these firms in no way indicated that the holding of the conference was conditional or would be called off if Union demands were met by the Company. The letter written by the Union to the Company that accompanied a copy of the invitation sent to other firms stated unequivocally: "This is to advise you that SPEEA *has started and will complete* a Manpower Availability Conference" (R. 493) (emphasis added). Further, in this case Pearson was not in the position of an employee who was making a threat or conditional threat to quit his job; rather Pearson was in the position of heading up a plan of action designed to facilitate and encourage *others* to leave their employment, while he at the same time was making every possible effort (witness these proceedings) to retain *his* job, and to retain all seniority and other rights in respect thereof, and to continue to receive his pay check. The right to quit does not extend to an individual or group the right to encourage or facilitate *permanent terminations*. The difference is fundamental.

The majority Board opinion also contends that the instant case must be distinguished from the *Jefferson Standard* case because the MAC "was directly related to matters of collective bargaining in issue between the

Respondent and the Union" (R. 137) and because "The vice of the employees' conduct in the *Jefferson Standard* * * * case was that it involved a direct attack upon the employer and its business, unrelated to terms or conditions of employment or to any matter in issue between the union and the employer" (R. 138). Assuming the facts in the instant case and the *Jefferson Standard* case were to support such a distinction (we contend they do not), the importance of such a distinction is not apparent. The distinction attempted by the majority amounts to saying that employees can engage with impunity in any type of concerted activities (although the primary intended result of the means used is to damage the employer and at the same time stay on the payroll) so long as the activities "relate to terms or conditions of employment or to any matter in issue between the union and the employer" (R. 138).

Given a situation where employees embark on concerted activities the primary intended result of which is to injure the employer seriously *and at the same time stay on the payroll*—why should their conduct be any more "protected" in the case of publicly condemning the employer's product as in *Jefferson Standard,* than in a case where the union is endeavoring irreparably to cripple the employer by bringing about a mass exodus of its employees? If the reasoning of the majority of the Board in this respect is followed to its logical conclusion, such unprotected activities as refusals to work overtime, intermittent strikes, and the like would all achieve the protection of Section 7 because it could be shown in almost every instance that they were "related

to terms or conditions of employment or to [some] matter in issue between the union and the employer." Both the activities involved in the instant case and in the *Jefferson Standard* case can be regarded as "related to terms or conditions of employment" in that they grew out of bargaining disputes. But to say one activity is protected by Section 7 and the other is not, simply on the basis that the MAC letter of invitation did not talk about the employer's product and the handbills in the *Jefferson Standard* case did, is to apply a superficial, unsound and entirely unwarranted test of statutory scope. The vice of the activities in both cases is that in each instance the primary intended result of the means used was to effect severe damage on the employer and at the same time permit and insure to the employees involved the continuance of their compensation and the retention by them of complete job security. Actually, the MAC type of action amounts to a rejection of the bargaining principle (discussed hereinafter) and might therefore be said to represent even a more drastic departure from the objectives of the Act than do the activities involved in *Jefferson Standard.*

* * *

The Company predicates its argument in respect of the scope of Section 7 on the proposition that the "protected" nature of concerted activities cannot be tested solely on the basis of the legality or propriety of the ultimate long range objectives of such activities (*i.e.,* better wages, better working conditions), but must be tested in addition on the basis of the propriety of the *primary intended result of the means used* in connection with such activities, and also on the basis of whether such

means and such intended result are consistent with the obligations, including the duty to bargain in good faith, imposed upon labor organizations by the Act.

Let us examine the primary intended result of the means used in the instant case. As noted previously, the MAC was characterized in Union circles as a "*punitive* action to *reduce the engineering services available to Boeing*" (R. 33, 478); as a "*punitive* action *to discourage new hires from coming to Boeing*" (R. 33-4, 478-9) as a means "to *encourage* engineers to seek more suitable employment elsewhere" (R. 368). It was devised as a substitute for a strike (R. 343); it was referred to by the head of the Union as a "pressure action" (R. 261); it was developed as a companion idea along with such associated proposals as mass refusals to punch timeclocks, mass refusals to work overtime, "arrangement" of simultaneous medical or dental appointments to bring about sporadic mass absences, intermittent work stoppages, union meetings during work hours, and action calculated to neutralize the Company's recruitment campaign in various colleges and universities by discouraging potential new hires from coming to Boeing for employment (R. 100, 240, 245-6, 334-9, 345-6, 370). The Union was well aware of the potential damage inherent in the means involved in connection with the MAC, and anticipated the terminations of engineers in sufficient quantities so that the Company could not operate, or at least operate only under great difficulty (R. 357). The Union had advance notice from the Company of the potential damage involved and of the Company's attitude toward such course of action (R. 418-9). It was an inherent part

of the Union's scheme to activate the course of action at a time when engineers were in short supply (R. 360).

As to the magnitude of the potential damage to the Company involved in activation of the MAC, reference is made to the testimony appearing on pages 423-427 of the Record, summarized by the Trial Examiner as follows:

> "Vice President Logan testified without contradiction, and I find, that the Respondent's backlog of business at its Seattle Division currently stands at almost an even billion dollars. It involves orders, primarily placed by the United States Air Force, for items vital to our national defense: heavy bombers, guided missiles, gas turbines, and various classified research and experimental projects. All of the Respondent's projects appear to be technical—some highly so—and impossible of completion in the absence of an adequate engineering staff. Logan estimated that if a substantial number of the firm's engineers had resigned at the same time, or within a short period, the Respondent would have had to suspend one project after another as long as the exodus continued; he expressed the opinion—without contradiction—that the firm would have lost 'millions of dollars' worth of business through the forced abandonment of current projects or their cancellation by the Air Force, and that it might have taken the Respondent several years to recover from such a blow, at a cost to it of unnumbered millions of dollars. The Vice President's estimates and opinion have not been challenged as unreasonable." (R. 103-4).
>
> "In the usual situation, the impact of a strike upon an employer's operations is both immediate and total—or, at the very least, significant. Em-

ployee attrition as the result of a Manpower Availability Conference might not have had the drastic effects characteristic of a strike situation at the outset—but there can be no doubt of the possibility that it might have reached such proportions as substantially to affect the Respondent's operations. And there can be no doubt, either, that its harmful results would have persisted far beyond those properly to be anticipated from a strike of reasonable duration. If successful, in short, the MAC could have contributed substantially to a significant impairment of the Respondent's ability to operate—which, in the case of engineers, could have lasted, conceivably, for a notably lengthy period of time. (There is testimony in the record—which has not been disputed—as to the informed opinion of the Respondent's officials that the successful completion of the MAC could have forced the Respondent to shut down several of its current projects; that its contracts with the Air Force might have been cancelled as a result, with immensely significant financial repercussions; and that the replacement of any experienced engineers who resigned, in the light of the current engineer shortage, would have taken as much as several years. The record shows that the fears of the Respondent in this respect were not articulated to impress the Board; they were communicated to the Union in connection with the Respondent's attempt to justify its course of conduct with respect to Pearson's termination. I so find. And the record, insofar as I can determine, contains no evidence whatever to warrant an inference that the Respondent's fears were illogical or ill-founded.)" (R. 97-8).

Even a *strike* has been held to be unprotected where

it resulted in serious and inordinate financial loss, see *N.L.R.B. v. Marshall Car Wheel & Foundry Co.*, ... F.2d ...., 35 LRRM 2320 (CA-5, 1955). There the striking employees intentionally chose a time for their walkout so as to create a risk of substantial property damage and pecuniary loss to the employer. In spite of the fact that the damage did not actually result because the employer was able to alleviate the situation, the court held the activity unprotected under the Act. The court stated:

> "We think the majority of the Board had no authority to compel reinstatement of those employees who either participated in, authorized or ratified the illegal walkout of October 16, 1951. That the union deliberately timed its strike without prior warning and with the purpose of causing maximum plant damage and financial loss to respondent cannot be denied. Even conceding the validity of the general principle relied upon, i.e., that employees who engage in certain unprotected activities do not automatically lose their employee status for remedial purposes under the Act, it seems to us that the illegitimate nature of this activity, though taking the form of a concerted walkout rather than a sitdown strike, renders it closely akin to that type of irresponsible and unprotected activity condemned by the Supreme Court as effectively removing the guilty employees from statutory protection."

We re-emphasize the basic proposition that a concerted activity should not and cannot be deemed protected by Section 7 of the Act where the primary intended result of the means used is to effect severe damage on the employer and at the same time permit

and insure to the employees involved, including employed union leaders sponsoring the action, the continuance of their compensation and the retention by them of complete job security. The potential damage in the instant case was severe and irreparable. Such damage was designed to be inflicted on the employer here in such a way as to preclude the employer from doing anything but continuing to pay, employ and thus finance those precipitating, facilitating and encouraging such damage. Such damage was the intended result of the activities in which Pearson was engaged and such activities must be regarded as inherently "improper," "disloyal," "indefensible," irreconcilable with the basic purposes of the Act, and plainly beyond the scope of Section 7.

2. Pearson's discharge was proper because the activities for which he was discharged amounted to a refusal to bargain in good faith on the part of the Union.

Where such conduct as that identified with the MAC occurs as part of a union's bargaining technique, it constitutes an "illegal" course of conduct upon the part of those involved, in that such conduct fails to meet the bargaining standards of Sections 8(b)(3) and 8(d) of the Act; and one so involved is not clothed with the protection of Section 7.

Sections 8(b)(3) and 3(d) embody the obligations imposed upon labor organizations to bargain in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and a failure of a union to meet such obligation is an unfair

labor practice under the Act. The Trial Examiner refrained from determining whether the MAC and the activities in connection therewith amounted to a failure to bargain in good faith on the part of SPEEA and thus a violation of Section 8(b)(3), stating in effect that the Board should be the first to act on the point involved (R. 77). The majority Board opinion makes no mention of the point (R. 130-145).

It is inconceivable that an activity can be considered as consistent with the type of good faith bargaining that the Act clearly contemplates, or can be regarded otherwise than as irreconcilable with the primary aims of Congress in creating the Act, where the primary intended result is to create, facilitate and encourage an exodus and permanent severance of an employer's employees.

It was the intention of Congress in enacting the 1947 amendments to the Act to enforce the same standards of bargaining as to labor organizations as were previously applicable only to employers. In *Chicago Typographical Union, et al.* (*Chicago Newspaper Publishers' Association*) 86 NLRB No. 116, 25 LRRM 1010 (1949) the Board stated that the statute as amended imposes upon labor organizations a duty to bargain "coextensive" with the duty imposed upon employers. As mentioned in the Recommended Order (R. 73) the Board declared therein "that the provisions of Section 8(d) defining the standard of good faith bargaining restate, in statutory form, the principles established under Section 8(5) [of the original statute, relating to employers]." And in *Textile Workers, CIO (Per-*

sonal Products Corp.), supra, the Board found the union to be in violation of Section 8(b)(3) where it had engaged in a series of unprotected harassing tactics during negotiations, which included organized refusal to work overtime, unauthorized extension of rest periods from 10 to 15 minutes, direction of employees to refuse to work special hours, slowdowns, unannounced walkouts and inducement of employees of a subcontractor not to work for the employer. Such tactics were regarded as "an abuse of the union's bargaining powers—'irreconcilable with the Act's requirement of reasoned discussion in a background of balanced bargaining relations upon which good faith bargaining must rest' * * * ." And see remarks of this Court as to the equal application of the Act to employers and labor organizations in *Davis Furniture Co. v. N.L.R.B.,* ...... F.2d ......, 32 LRRM 2305 (CA-9, 1953).

If such duty to bargain in good faith is coextensive as to employers and unions alike, consider then the converse of the situation under discussion where an employer, during a period of acute unemployment and while bargaining with a union, publishes plans to move the work in his plant elsewhere, progressively, until such time as the union capitulates to his bargaining position, and then takes the initial steps necessary to such movement and does everything further that he can possibly do to carry out such a program. Could there be any serious doubt but that his actions would be regarded as being in violation of Section 8(a)(5) requiring employers to bargain in accordance with the standards set by the Act? See *Precision Fabricators, Inc. v.*

N.L.R.B., 204 F.2d 567, 32 LRRM 2268 (CA-2, 1953); *Diaper Jean Mfg. Co.*, 109 NLRB No. 152, 34 LRRM 1504 (1954). The MAC amounts to parallel conduct on the part of a union and should likewise be held to be a refusal to bargain in good faith.

Again, on the matter of bargaining in good faith, and in respect of the attempt of the Board majority to clothe the MAC with the Act's protection by drawing an analogy between it and a strike, it is to be pointed out that a strike cannot be regarded as a rejection of the bargaining principle and the MAC, after it had passed the "threat" stage and had been activated, must be regarded as a flagrant rejection of the principle. A *strike,* in contradistinction to the MAC type of activity, is in no way related to *an abandonment of employment* or to *an abandonment of the employer,* nor does it even constitute a threat to abandon such employment. Employees on strike, in effect, say to an employer: "We are not leaving you or abandoning you; but we are going to absent ourselves from our work, suffer loss of pay and risk replacement, until our absence hurts you badly enough to force you to come to terms. In the meantime you cannot discharge us. When you do come to terms, we shall be here and ready to go back to work. *Our efforts are directed toward continuing to work for you and not for someone else;* they are also directed toward working out a contract more to our liking *with you.*"

Further, it is difficult to understand how a labor organization can be regarded as conducting the good faith bargaining required by the Act, on behalf of *all*

of the employees in the collective bargaining unit represented by it, where such organization in connection with its bargaining activities sponsors a movement designed to eliminate permanently from the unit a substantial number of those it represents. We do not think that facilitating and encouraging the exodus of some of the employees represented, for the possible benefit of those remaining, is consistent with the statutory duty of an agent certified to represent *all* employees in a unit *in dealings with a particular employer.* And the facilitation and encouragement of permanent group movements of employees from one employer to another is in itself repugnant to the stability in labor relations that is a primary objective of the Act. Quoting from *N.L.R.B. v. Brooks,* 204 F.2d 899, 907, 32 LRRM 2118 (CA-9, 1953): "A primary objective of the Wagner Act, and to an even greater extent the Taft-Hartley Act, was stability in industrial relationships."

Even the majority Board opinion includes "engaging in conduct which cast[s] doubt on the Union's good faith at the bargaining table" (R. 137) as one of the types of conduct conceded to be unprotected. Certainly an individual such as Pearson who was the one primarily in charge of sponsoring, developing and activating the MAC course of conduct, was so engaged.

3. Pearson was properly discharged for "cause" under Section 10(c) of the Act.

The right of an employer to terminate an employee for any cause or no cause, absent any statutory or contractual prohibition, is clear. The following language from *United Electrical Radio and Machine Workers of*

America, et al. v. General Electric Co., ... F.Supp. ......, 35 LRRM 2285 (D.D.C. 1954), is typical:

> "An employer's right to employ and discharge whom he pleases, in the absence of any statutory or contractual provision is unquestioned. As the Court of Appeals, 10th Circuit, said in Odell v. Humble Oil and Refining Co., 201 F.2d 123, 128, Cert. denied 345 U.S. 941, 942, 97 L.Ed. 1367.
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> " 'It is the universally recognized rule that in the absence of a contract or statutory provisions an employer may discharge an employee without cause or reason or for any cause or reason. (citing cases) * * * .' "

The Act upon which these proceedings are based specifically preserves the right to discharge for cause. Quoting from the same decision:

> "In the Labor-Management Relations Act of 1947, 29 U.S.C. 141, et seq., the right of the meployer to discharge for cause was specifically preserved by a provision in Section 10(c), 29 U.S.C. 160(c) to the effect that
>
> " ' * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged *for cause.* * * * ' " (emphasis added).

The majority Board opinion contains no mention of this section of the Act.

If Pearson had acted alone and on his own in inducing and encouraging employees to leave the Company's employ, in soliciting 2,800 firms to hire the Company's employees, in representing himself as a "Licensed and

Bonded Employment Agent" (R. 489) to carry out such objective, and in setting up and carrying forward the elaborate preparations to bring this about that were part of the MAC plan, surely there could be no serious question as to an adequate basis for discharging him for "cause."

In *N.L.R.B. v. Metal Mouldings Corp.,* 12 LRRM 723 (CA-6, 1943), an employee was discharged for recruiting employees for another employer. Although the decision is not entirely clear on the point, it indicates that the court regarded the recruitment of employees for a competing employer as a justifiable cause for discharge.

If a discharge is properly one for "cause" it does not become any less so simply because more employees than one are engaged in the activities that occasioned the discharge. The Supreme Court stated in *International Union, et al. v. Wisconsin Employment Relations Board et al.,* (Briggs & Stratton), *supra,* 336 U.S. at 258: "But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." And more recently in *N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.), supra,* the Supreme Court stated at 473-4:

> "Congress, while safeguarding, in §7, the right of employees to engage in 'concerted activities for the purpose of collective bargaining or other mutual aid or protection,' did not weaken the underlying contractual bonds and loyalties of employer and employee. The conference report that led to the enactment of the law said:
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> " '[T]he courts have firmly established the rule that under the existing provisions of section 7 of

the National Labor Relations Act, employees are not given any right to engage in unlawful or other improper conduct * * * .

" ' * * *

" ' * * * Furthermore, in section 10(c) of the amended act, as proposed in the conference agreement, it is specifically provided that no order of the Board shall require the reinstatement of any individual or the payment to him of any back pay if such individual was suspended or discharged for cause, *and this, of course, applies with equal force whether or not the acts constituting the cause for discharge were committed in connection with a concerted activity.' HR Rep No. 510, 80th Cong, 1st Sess 38-39."* (emphasis added.)

CONCLUSION

In conclusion, we urge adoption of the views expressed in the dissenting Board opinion as reflecting, when compared with those of the majority opinion, a far more searching and realistic characterization of the activities involved in this case, and as properly articulating the basic objectives of the Act as applied to such activities:

"The Trial Examiner concluded—and the majority does not dispute this conclusion—that the Union's activity, in seeking to facilitate the resignations of a substantial number of the Respondent's engineers, could have caused substantial damage to the Respondent's business. Moreover, contrary to the assertion of the majority, such damage cannot be equated with the losses potentially inherent in a strike; for the damage caused by the Union's activities would have resulted from a permanent severance of the employer-employee rela-

tionship and not, as in a strike, from the mere temporary cessation of work. Pearson sought both to participate in the Union's activity and to continue to draw his pay from the Respondent. The Respondent discharged him because it did not believe it was required to finance such an injury to itself by continuing on its payroll an employee engaged in activities designed to induce other employees to sever their employment relationship. The Respondent's belief, in our opinion, was correct, and its action was wholly within its rights.

" * * * We are not here concerned with the legitimacy of the Union's objectives, but rather with the illegitimacy of the means by which the Union sought to achieve those objectives. The Manpower Availability Conference was not a gathering together in concert of employees in order to compel the grant of a bargaining demand by a temporary refusal to work; it was, rather, an employment agency operated under the aegis of the Union for the purpose of causing the permanent severance of the employment relationship. Such activity is the antithesis of the purposes of the Act, which seeks to strengthen the bonds of cooperation between employer and employee. It is equally as disloyal, equally as injurious to the employer's business, and equally as disruptive of industrial peace and stability, as the conduct which was condemned in the above-cited cases [*N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard Broadcasting Co.)* and *Hoover Co. v. N.L.R.B., supra*]. Because it was conceived and utilized for purposes opposed to the purposes of the Act, the activities of the Manpower Availability Conference derive no protection from the guarantee of Section 7 of the Act.

The Respondent's discharge of Pearson, because of his participation in such an unprotected activity, was accordingly not unlawful, and we would therefore dismiss the complaint in its entirety." (R. 145-8).

Respectfully submitted,

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